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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DEREK B., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

DEREK B.,

Defendant and Appellant.

D051991

(Super. Ct. No. J216325)

APPEAL from a judgment of the Superior Court of San Diego County, Frances M. Devaney, Judge. Affirmed.

The Superior Court of California, County of Solano, juvenile court case No. J37253,¹ found true an allegation that minor Derek B. resisted a police officer in the

¹ By the time of the disposition hearing, October 5, 2007, Derek had relocated from Solano County to San Diego County, and therefore the case was transferred to San Diego County and the disposition hearing was held before a San Diego County judge, Hon. Frances M. Devaney, case No. J216325.

discharge of the officer's duties, in violation of Penal Code² section 148, subdivision (a)(1). However, the court rejected the more serious allegation that Derek resisted arrest in violation of section 69.

Derek appeals the judgment. He contends there is insufficient evidence in the record to support the court's true finding he violated section 148, subdivision (a)(1), because he claims he did not resist the officer and because the officer used excessive force in detaining and arresting him. He further contends the trial court committed judicial misconduct that denied him a right to a fair trial.

We conclude substantial evidence supports the true finding Derek violated section 148, subdivision (a)(1). We further conclude Derek forfeited his claim of judicial misconduct, and, in any event, the record does not support his contention the court committed misconduct or denied him a fair trial. We thus affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On an evening in late January 2007, security guard Arthur Sandoval approached two boys standing in a stairwell near a movie theater in the Solano Mall, where Sandoval worked, and told them for safety reasons they could not stay there. As the boys began to leave, Sandoval saw other boys, including Derek, sitting at the top of the stairwell. He told them they also could not stay there. Rather than following Sandoval's instructions, Derek began arguing with Sandoval, stating his friends were just taking pictures. Sandoval explained that taking pictures of "entrances of theaters or any store" was against

² All further statutory references are to the Penal Code unless otherwise specified.

mall regulations and policies and that if the boys, including Derek, did not like the rules of the mall they could leave. The argument between Sandoval and Derek intensified, as Derek continued to argue with Sandoval.

Fairfield Police Officer Cade Beckwith was in full uniform that evening and, along with his partner, was assigned to patrol the mall. Beckwith saw Derek and Sandoval arguing. He intervened and told Derek at least five times it was time for Derek to leave the mall property because he was being uncooperative with mall security. A crowd began to gather, and Sandoval asked the crowd to disperse. Nonetheless, Derek continued to argue with Beckwith and refused to leave, despite being warned by Beckwith that he would be arrested for trespassing if he continued to oppose the officer.

Beckwith pointed north with his finger, showing Derek the direction to take to leave the mall. In disregard of the officer's authority, Derek started walking in the opposite direction, toward the mall entrance. Beckwith demanded that Derek stop. Derek then turned in the direction of Beckwith and began to walk toward the officer.

Beckwith testified that when Derek was about three feet away, Derek "made a flinching motion, as if he [was] going to strike me." Feeling threatened, Beckwith flinched to avoid being struck by Derek, grabbed him and attempted to handcuff him. Derek began cursing and yelling and attempted to pull away from Beckwith. Beckwith's partner stepped in and he also grabbed Derek; together they wrestled Derek to the floor and handcuffed him. In the fall, Derek suffered a cut to his lip.³ After he was

³ Derek received outpatient medical treatment for a cut on his lip.

handcuffed, Derek threatened Beckwith at least twice, telling Beckwith he was "going to kick [his] ass."

The Solano County District Attorney filed a petition under Welfare and Institutions Code section 602 charging Derek with felony resisting arrest in violation of section 69 and resisting and/or obstructing a police officer in the discharge of his or her duties in violation of section 148, subdivision (a)(1), a misdemeanor. At Derek's jurisdictional hearing, the court rejected the allegation Derek violated section 69 but made a true finding Derek resisted police officers in the discharge of their duties, in violation of section 148, subdivision (a)(1).

DISCUSSION

I

Violation of Section 148, Subdivision (a)(1)

A. Standard of Review

Like those of an adult criminal proceeding, the factual findings of a juvenile court are reviewed under the substantial evidence test. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430; *In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) On a claim of insufficient evidence to support a conviction, a reviewing court views the factual findings of the juvenile in the light most favorable to respondent to determine whether substantial evidence supports the conclusion of the trier of fact. (*In re H.B.* (2008) 161 Cal.App.4th 115, 119-120.) The reviewing court indulges all reasonable inferences to uphold the judgment, and " '[i]f there is substantial evidence supporting the judgment, our duty ends and the judgment must not be disturbed.' [Citation.]" (*Id.* at p. 120.) "The test on appeal

becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mosher* (1969) 1 Cal.3d 379, 395, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 30, and in *People v. Milner* (1988) 45 Cal.3d 227, 237; see also *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1328.)

"Substantial evidence is evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the appellant guilty beyond a reasonable doubt." (*In re Muhammed C., supra*, 95 Cal.App.4th at p. 1328.) In making this determination, we recognize that all conflicts in the evidence are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Jason L.*, (1990) 222 Cal.App.3d 1206, 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.)

B. Statutory Requirements

Section 148, subdivision (a)(1), provides in part: "Every person who willfully resists, delays, or obstructs any public officer [or] peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed," is guilty of a misdemeanor.

Thus, the elements of a violation of section 148, subdivision (a), are: "(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108-

1109 (*Simons*); see also *People v. Lopez* (1986) 188 Cal.App.3d 592, 600, fn. 3; CALJIC No. 16.102.) "The offense is a general intent crime, proscribing only the particular act (resist, delay, obstruct) without reference to an intent to do a further act or achieve a future consequence." (*In re Muhammed C.*, *supra*, 95 Cal.App.4th at p 1329.)

However, a "[d]efendant cannot be convicted of an offense against an officer engaged in the performance of official duties unless the officer was acting lawfully at the time." (*Simons*, *supra*, 42 Cal.App.4th at p. 1109, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 (*Gonzalez*).) "The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in 'duties,' for purposes of an offense defined in such terms, if the officer's conduct is unlawful. [Citations.]" (*Gonzalez*, *supra*, 51 Cal.3d at p. 1217.)

C. *Excessive Force*

An arrest cannot be lawful under section 148, subdivision (a)(1), if a police officer uses excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 44-45.) Excessive force is not within the performance of an officer's "duties" under this statute. (*Id.* at p. 44; see also *People v. Soto* (1969) 276 Cal.App.2d 81, 85 (*Soto*).) Therefore, a person "who uses reasonable force to protect himself or others against the use of unreasonable excessive force in making an arrest is not guilty of any crime." (*Soto*, *supra*, 276 Cal.App.2d at p. 85.)

"The reasonableness of a particular use of force is judged from the prospective of a reasonable officer on the scene, not by the 20/20 vision of hindsight. The inquiry is an objective one: Was the officer's action objectively reasonable in light of all the facts and

circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation?" (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 989.) "It is a pure question of fact whether a police officer used reasonable force in detaining a defendant, so reviewing courts determine if there is sufficient evidence in the record for a reasonable trier of fact to conclude that the force used in effectuating a detention was reasonable." (*In re Joseph F.*, *supra*, 85 Cal.App.4th at p. 989; see also *People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 8.)

D. *Analysis*

Derek contends the evidence is insufficient to support the finding he "resisted" Beckwith and his partner in the performance of their duties and to demonstrate the officers used reasonable force in his arrest. He instead contends the evidence shows they used excessive force when they grabbed his arms and wrestled him to the ground, which he claims rendered the arrest unlawful. We disagree.

As to his first contention, Derek argues the "record in this case is absent of any suggestion that, because [appellant] failed to immediately acquiesce to Officer's Beckwith's attempts to handcuff him, that he had resisted arrest." Derek, however, ignores the substantial evidence standard of review and omits key facts in the record in support of the judgment.

Viewing the facts in the record in the light most favorable to the People, there is sufficient evidence to support the juvenile court's finding Derek "resisted" the officers in the performance of their police duties. The evidence shows that before his arrest Derek began arguing with Sandoval and refused to follow the security guard's instructions and

that Sandoval told Derek if he did not like the rules of the mall he could leave the property altogether.

The evidence further shows Beckwith and his partner were dressed in full police uniform and were on patrol at the shopping mall; that only after Derek refused Sandoval's requests to leave the stairwell area did the officers intervene; that Beckwith told Derek at least five times to leave the mall because he was refusing to follow its rules and regulations; and that Derek refused to leave, even after Beckwith warned Derek he would be arrested for trespassing.

The evidence in the record also shows Derek started walking in the opposite direction requested by the officer, toward the mall entrance, in defiance of the officer; that when Beckwith called for Derek to stop, Derek turned toward the officer and began walking directly at the officer; and that when Derek came to within a few feet of Beckwith, Derek made a "flinching" motion, suggesting to Beckwith that Derek was about to strike him. It was at that point Beckwith grabbed Derek to handcuff and arrest him. When Derek began to curse and twist to get away, Beckwith's partner also grabbed Derek, and the two officers wrestled Derek to the floor and handcuffed him.

On this record, we conclude there is ample evidence to support the juvenile court's true finding that Derek "resisted" the officers in the performance of their police duties. We further conclude this same evidence shows the officers used reasonable, and not excessive, force when they grabbed Derek's arms and wrestled him to the floor.

II

Due Process Violation Based on Judicial Bias/Misconduct

Derek contends he was denied due process and a fair trial based on judicial misconduct by the Solano County trial judge. We conclude Derek did not preserve his claim of judicial misconduct, however, because, as he acknowledges, his trial counsel did not timely object to such instances of alleged misconduct. Independent of forfeiture, Derek's claim of judicial misconduct lacks merit.

A. Forfeiture

"As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on that ground at trial. [Citations.] However, a defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or when objecting would be futile. [Citations.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237 (*Sturm*); see also *People v. Sanders* (1995) 11 Cal.4th 475, 531.)

Derek argues that any objection to the alleged misconduct would have been futile because "defense counsel's several objections were met with denials and demeaning language, indicating that any further objections would have been fruitless." However, the record does not support his contention. The record instead shows the court consistently responded to the parties' objections in a concise and impartial manner. By failing to object and bring the issue of judicial misconduct to the juvenile court's attention, Derek prevented that court from addressing head on the alleged misconduct, where it could best be resolved. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590.) Even without

forfeiture, we conclude there was no judicial misconduct and/or prejudice resulting from any such misconduct.

B. *Analysis*

Derek contends the Solano County juvenile court exhibited bias by prejudging the merits of his case, before presentation of all the evidence. During the contested hearing, Derek sought to admit photographs of his cut lip to show the officers used excessive force in his arrest. The court asked defense counsel if she was disputing that Derek was injured when officers wrestled him to the floor. Defense counsel responded: "No, [b]ut I think the Court should be entitled to consider all the evidence, including the injuries sustained." The court stated: "I consider that, that in his *resisting*, when he was being arrested, he got his lip hurt." (Italics added.) The court ruled the photographs were inadmissible.

Derek contends the court's statement, "in his resisting," demonstrates the court already reached a decision on the merits before all the evidence was admitted. We disagree. Merely because the court used the word "resisting" in this context does not mean the court decided Derek resisted arrest for purposes of section 148, subdivision (a)(1), or determined the prosecutor satisfied the People's burden to prove beyond a reasonable doubt all elements of section 148, subdivision (a)(1). To conclude otherwise would amount to a judicial reading of "tea leaves."

In addition, the record does not support Derek, and instead shows the court had not yet decided the merits of the case when it made this statement. After refusing, at least initially, to admit the photographs, and in response to defense counsel's statement that the

photographs tended to show the officers used excessive force with Derek, the juvenile court told defense counsel, "[i]f you want to establish [excessive force], ask the officer the questions." By inviting defense counsel to question Beckwith on the issue of reasonable or excessive force, the court had not yet decided whether Derek's conduct violated section 148, subdivision (a)(1).

Derek also has not shown prejudice even assuming there was judicial misconduct. " 'Our role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [appellant] a fair, as opposed to a perfect, trial.' " (*People v. Snow* (2003) 30 Cal.4th 43, 78 (*Snow*).)

Derek next contends the court disregarded the law when it made the statement, "I don't care about the jury instruction," in response to defense counsel's argument there was a jury instruction regarding the use of excessive force and that the photographs of Derek's injuries were relevant to show the officers here used excessive force. Derek does not cite any authority in support of this assertion. However, in a contested hearing under Welfare and Institutions Code section 602, the court is the trier of fact, and thus there is no need for jury instructions, which would explain the court's comment.

Other than this one comment, Derek has no support for his contention the court refused to follow the applicable law, nor does he argue the outcome of his case would have been different if the court had applied the "correct" law. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) " 'Where a point is merely asserted by counsel without any . . . authority for its proposition, it is deemed to be without foundation and

requires no discussion.' [Citation.]" (*People v. Dougherty* (1982) 138 Cal.App.3d 218, 282 (*Dougherty*)). We conclude there was no misconduct by the court in making this statement.

Derek argues the court also committed misconduct during defense counsel's closing argument, as she was summarizing the incident as follows: "[H]e's 15 years old; he's at the mall; he weighs maybe 145 pounds; he's unarmed; he's been wrestled to the ground in front of his friends." The court interjected, "[y]ou left off his arguing with the security officer and the officer here." Defense counsel responded, "[f]air enough." As counsel was about to continue, the court stated, "[h]e's a wise guy, is what he was," referring to Derek.

Derek argues these "interjections" by the court were inappropriate and demonstrate it was not a neutral fact finder. Derek again does not cite any authority in support of this assertion. (See *Dougherty, supra*, 138 Cal.App.3d at p. 282.) Moreover, this argument ignores the right of a trial court to " 'control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.' " (*Sturm, supra*, 37 Cal.4th at p. 1237.) "A [trial court's] ordinary efforts at courtroom administration – even a [trial court's] stern and short-tempered . . . ordinary efforts at courtroom administration – remain immune." (*Liteky v. U.S.* (1994) 510 U.S. 540, 556 [114 S.Ct. 1147].) We thus reject Derek's contention that these "interjections" are misconduct.

With respect to the "wise guy" comment, although perhaps "better left unsaid," it does not show Derek was deprived of the right to a fair (but not perfect) trial. (*Snow, supra*, 30 Cal.4th at p. 81; *People v. Melton* (1988) 44 Cal.3d 713, 754 [isolated comments by trial court "fall short of the intemperate or biased judicial conduct which warrants reversal"].)

We likewise reject Derek's contention the court engaged in misconduct when it commented Derek likely could not rehabilitate his only *Pitchess* witness, who testified Beckwith stopped him in his car in March 2007 and, after claiming to smell marijuana, made him put his entire arm out the car window before opening the car door. Beckwith also made the witness lie down on his stomach on the ground, while Beckwith waited for backup to bring a drug-sniffing dog.

On rebuttal, Derek sought to introduce evidence that the witness had a medical marijuana prescription. The court sustained on relevancy grounds an objection to this evidence, rejected defense counsel's argument that marijuana was legal with a prescription, and stated in response, "No, that has nothing to do with the fact you're claiming excess force by the officer on this gentleman here who, evidently, has the smell of marijuana in his car." Defense counsel further argued that evidence of a prescription for marijuana went to "rehabilitate the witness," to which the court stated, "I don't think that's too possible."

The court was correct in ruling a prescription for marijuana was irrelevant on the issue of excessive force. The record also does not support a finding that Beckwith used inappropriate, much less excessive, force in the traffic stop. Although the court's

comment regarding the credibility of the witness may have been "better left unsaid" (*Snow, supra*, 30 Cal.4th at p. 81), it was the court's job as trier of fact to weigh the credibility of the witnesses and the evidence. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) We conclude there was no misconduct here.

Finally, we reject Derek's contention the court engaged in misconduct when the court initially stated it would hear and decide his motion to suppress evidence before the contested hearing, only later to change its mind and (apparently without telling counsel) decide the motion to suppress in the course of the contested hearing. Derek argues the court's conduct shows it was "not paying close attention" to this case and in any event engaged in misconduct when the court gave defense counsel only "one minute" to argue the motion to suppress.

Derek again cites no authority for his proposition that the court erred or committed misconduct by hearing and ruling on the motion to suppress in the course of Derek's contested hearing and by limiting counsel to one minute of argument on the motion to suppress. Moreover, Derek suffered no prejudice even if there was error or misconduct, as Derek has not appealed the trial court's ruling on his motion to suppress. (*Snow, supra*, 30 Cal.4th at p. 81.)

Because Derek failed to show misconduct or to demonstrate prejudice resulting from any such misconduct, we reject his final contention—that the cumulative effect of such misconduct requires a reversal of his conviction. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675 [the errors identified were minor and did not individually or

cumulatively alter the outcome of the trial].) We conclude the record instead shows Derek received a fair trial. (See *Snow, supra*, 30 Cal.4th at p. 78.)

III

Evidentiary Rulings

Briefly, Derek claims the court erred when it (1) refused to admit photographs of his cut lip that were taken at the hospital by the police officers, (2) sustained on hearsay and relevancy grounds defense counsel's question to Sandoval about what he and Beckwith spoke about regarding this case five minutes earlier, before the proceedings began, (3) denied Derek's attempt to rehabilitate his *Pitchess* witness by admitting evidence this witness had a prescription for medical marijuana and (4) refused to allow Derek's mother to testify that she previously overheard Beckwith say in a courtroom hallway, " 'Once I got away with slapping a kid,' " to show Beckwith had a "habit of using excessive force during arrests."

We review these rulings under an abuse of discretion standard. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 211-212.) We conclude there was no such abuse here with respect to each of the above evidentiary rulings, as the court acted well within its discretion in excluding such evidence. (See *People v. Osband* (1996) 13 Cal.4th 622, 678.) Even if the court erred in refusing to admit such evidence, we conclude it was not

reasonably probable that Derek would have obtained a more favorable result absent such rulings. (*Watson, supra*, 46 Cal.2d at p 836.)⁴

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.

⁴ Derek requested we independently review the confidential police records of Officer Beckwith that the Solano County juvenile court examined in camera at the June 4, 2007, *Pitchess* hearing. Based on this court's own motion of October 20, 2008, we obtained the existing police records of Officer Beckwith. Our review of such records shows no discoverable materials in them.